

# Plea Bargaining in International Criminal Tribunals

## The end of truth-seeking in International Courts?

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*Truth-commissions became a frequently used institution in past-conflict societies. However, this article will argue that also criminal proceedings after mass atrocities can serve as an important institution to seek truth. In both, common law and civil law systems, it is often stated that the main purpose of the proceedings is to render justice. However, the value of a court as a truth-seeking instrument should not be underestimated, especially in international proceedings. This article will emphasize that the truth reached by a court has a unique value in the process of transitional justice. Nevertheless, this goal of a criminal proceeding contravenes to some extent with other values within a trial. Limitations on the truth-seeking objective therefore have to be made to meet the requirements of privacy rights of defendants and witnesses and the efficiency of the court. In this context, also the ICC will have to decide whether or not it will use plea bargaining. Earlier practices of plea bargaining by the ICTY and the ICTR have shown that to a certain extent truth-seeking is sacrificed for efficiency when courts use this procedural mechanism. The following article will demonstrate the importance of the truth-seeking objective in criminal proceedings from a domestic and international perspective. Furthermore, it will elaborate the different perspectives that can be drawn on plea bargaining in the context of the truth-seeking function of a court and it will finally determine whether or not the use of plea bargaining in international law will deprive the courts of one of their main objectives – truth.*

### I. Introduction

According to Kant “truth and error [...] are only to be found in a judgement”, precisely in the “relation of an object to our understanding”.<sup>1</sup> Truth is therefore based on a subjective understanding of the facts by each individual. The consequence of this approach is that different forms of truth can occur. In the context of transitional justice, where truth-seeking plays a major role for the purpose of reconciliation and peace-building, we have to ask: Who decides in this context what the truth is? A diverse picture of the truth after a violent conflict could undermine efforts to overcome the past. An official comprehension of the truth is needed which combines the different subjective views.

Truth-commissions became a frequently used institution after conflicts which are being installed to establish the truth of the past. However, this article will argue that also criminal proceedings after mass atrocities can serve as an important institution to seek truth. In both, common law and civil law systems, it is often stated that the truth-seeking function of a

criminal procedure is only of minor value and that the main purpose of the proceedings is to render justice.<sup>2</sup> However the value of a court as a truth-seeking instrument should not be underestimated, especially in international proceedings.<sup>3</sup> Although it is claimed that only truth-commissions in comparison to criminal trials can establish an exhaustive picture of the truth, because a trial can only establish the individual guilt of a defendant and cannot do justice in every case when there have been massive and systematic violations, this article will argue that the truth reached by a court has a unique value in the process of transitional justice. Law as an element of reviewing the past could be even defined as the most important element of truth-seeking mechanisms, because it allows us to define a crime as a crime.<sup>4</sup> Balkin says that “law has power over people’s imaginations and how they think about what is happening in social life”.<sup>5</sup> To the same extent we must understand criminal proceedings as a measurement of transitional justice that helps to create a historical record and to establish what has happened in the past. This objective of a trial becomes especially important in the context of international law.

However, this goal of a criminal proceeding contravenes to some extent with other values within a trial. Limitations on the truth-seeking objective therefore have to be made to meet the requirements of privacy rights of defendants and witnesses and the efficiency of the court. In this context, regarding the increasing number of cases in front of the ICC, the court will have to decide whether or not it will use plea bargaining to save time, capacity and money during the proceedings. Earlier practices of plea bargaining by the ICTY and the ICTR have shown that to a certain extent truth-seeking is sacrificed for efficiency when courts use this procedural mechanism.

The following article will demonstrate the importance of the truth-seeking objective in criminal proceedings from a domestic and international perspective. Furthermore, it will elaborate on the different perspectives that can be drawn from plea bargaining in the context of the truth-seeking function of a court and it will finally determine whether or not the use of plea bargaining in international law will deprive the courts of one of their main objectives – truth.

### II. Truth-seeking in a criminal trial

“Finding the truth is a difficult task under any set of circumstances, but finding the truth in the context of crime and punishment is almost impossible.”<sup>6</sup> Nevertheless, one of the ob-

<sup>1</sup> Kant, *The Critique of Pure Reason*, 1781, Transcendental Doctrine of Elements, Second Division. Transcendental Dialectic, Introduction, I. Of Transcendental Illusory Appearance, to be found on <http://ebooks.adelaide.edu.au/k/kant/immanuel/k16p/part1.2.2.i.html#part1.2.2.i.1> (12.7.2013).

<sup>2</sup> Naqvi, *International Review of the Red Cross* 88 (2006), 245 f.

<sup>3</sup> Naqvi, *International Review of the Red Cross* 88 (2006), 245 (246).

<sup>4</sup> Hankel, *ApuZ* 42/2006, 3 (7).

<sup>5</sup> Balkin, *Harvard Journal of Law and Public Policy* 2003, 5 (8).

<sup>6</sup> Weigend, *Harvard Journal of Law and Public Policy* 2003, 157.

jectives of every criminal procedure is to establish the truth. This objective is necessary on two accounts: it reflects the society's interest to know what happened in order to reestablish peace in the community and it also is fundamental to the concept of punishment as an ultima ratio of society's "expression of moral blame", which requires that the defendant is in fact guilty.<sup>7</sup>

The importance of truth-seeking in a criminal procedure differs depending on the procedural system. In the adversarial system the opposing parties present their differing versions of the truth in front of the court and challenge each others picture of the truth. In theory, the adversarial system emphasized the truth-seeking function of the court strongly by letting the witnesses swear to say the truth and by offering the parties a broad possibility to prove their version of the truth through cross-examination and presentation of evidence.<sup>8</sup> However the "adversarial nature of a court procedure makes it difficult for new information or truth to be disclosed as there is an incentive to limit truth rather than disclose" it.<sup>9</sup> This procedure will ultimately result in a mixed truth which has components of both parties' propositions and is therefore "built on the theory that two halves (of the truth) make one whole [...]".<sup>10</sup> Consequently, the trial results merely in a "procedural truth", one which is artificially established by the parties. This system holds many risks for the actual truth-finding. Due to the party-system at least one party has an interest in concealing the truth and the defence might act to establish incorrect facts. In addition the idea, that the evidence has to be presented in the trial itself, that means to a specific time, the "procedural truth" will be based only on a relatively small amount of facts due to the stricter law of evidence and some valuable information will be ignored if they have not been presented in front of the court.<sup>11</sup>

In contrast, the traditional inquisitorial system is based on an authoritative and neutral judge, who can investigate by himself. Although this approach avoids the challenge of having two parties that work against each other, this system bears the difficulty that it is almost impossible to obtain the truth from a defendant who does not want to reveal what he knows.<sup>12</sup> A traditional inquisitorial system will therefore also only reveal an incomplete truth, based on witnesses who are willing to cooperate. In the 19<sup>th</sup> century most inquisitorial systems therefore adopted more and more mechanisms to overcome the difficulties of establishing truth in a criminal proceeding.

Usually an additional institution such as a prosecutor was added to the proceedings who had the role of a neutral fact-finding organ.<sup>13</sup> At the same time the rights of the defendant, such as the principle of "nemo tenetur", evolved and made the traditional objective of a criminal proceeding, fact-finding, more difficult. However this mostly Continental approach operates on the assumption that a "disinterested search for the truth by a neutral judicial officer will lead to optimal results".<sup>14</sup>

To conclude, none of the present criminal procedural systems favours an unconditional search for truth. The truth-seeking objective is always limited by contradicting rights of the individual, especially the defendant's right to privacy.<sup>15</sup> Furthermore, there are restrictions due to the integrity of certain professional relationships, social interests in keeping state secrets, the right of the witness not to incriminate himself, exclusionary rules concerning illegally obtained evidence and "the desire to keep the criminal process speedy, efficient and within the limits of reasonable expenditure".<sup>16</sup>

The main difference in both fundamental procedural concepts remains. From the perspective of an adversarial system a "substantive truth" cannot be found in a trial, the fairness of a trial therefore becomes the main foundation of the judge's legitimacy.<sup>17</sup> The "substantive truth" is therefore replaced by the most convincing argumentation and the criminal procedure becomes more or less a "game" between the two parties governed by the rules of "fair trial".<sup>18</sup> Procedural truth is more or less a "by-product" of this system. A mainly inquisitorial approach however relies on the presumption that "substantive truth" can be found in a criminal process.<sup>19</sup> Nevertheless, *Weigend* claims that "truth-finding is unlikely to be the ultimate goal of (the) process" if you consider that also the inquisitorial system acknowledges practical and normative limits to this objective.<sup>20</sup> In his view the main goal of a criminal proceeding is conflict-resolution. Truth-seeking is an important mechanism to achieve this objective and is neces-

<sup>7</sup> *Weigend*, Harvard Journal of Law and Public Policy 2003, 157 f.

<sup>8</sup> *Weigend*, Harvard Journal of Law and Public Policy 2003, 157 (159).

<sup>9</sup> *Valji*, Centre for the Study of Violence Reconciliation, 2009, p. 11, to be found on [http://www.csvr.org.za/images/f\\_e\\_s.pdf](http://www.csvr.org.za/images/f_e_s.pdf) (12.7.2013).

<sup>10</sup> *Weigend*, Harvard Journal of Law and Public Policy 2003, 157 (159).

<sup>11</sup> *Weigend*, Harvard Journal of Law and Public Policy 2003, 157 (160).

<sup>12</sup> *Weigend*, Harvard Journal of Law and Public Policy 2003, 157 (160).

<sup>13</sup> *Weigend*, Harvard Journal of Law and Public Policy 2003, 157 (160).

<sup>14</sup> *Weigend*, Harvard Journal of Law and Public Policy 2003, 157 (162).

<sup>15</sup> See the judgment of the German Federal Court of Appeals, BGHSt 14, 358 (366): The court held that it is not a principle of criminal procedural law that truth should be sought at any prize; *Arzt*, in: Arnold et. al. (Hrsg.), *Menschengerechtes Strafrecht, Festschrift für Albin Eser zum 70. Geburtstag*, 2005, p. 691 (p. 692); *Stamp*, *Die Wahrheit im Strafverfahren*, 1998, p. 153.

<sup>16</sup> *Weigend*, Harvard Journal of Law and Public Policy 2003, 157 (168).

<sup>17</sup> *Weigend*, Harvard Journal of Law and Public Policy 2003, 157 (168); see also *Arzt* (fn. 15), p. 691 (p. 693).

<sup>18</sup> *Arzt* (fn. 15), p. 691 (p. 694).

<sup>19</sup> *Weigend*, Harvard Journal of Law and Public Policy 2003, 157 (168).

<sup>20</sup> *Weigend*, Harvard Journal of Law and Public Policy 2003, 157 (168).

sary for the legitimacy of punishment to overcome the presumption of innocence and any reasonable doubt.<sup>21</sup>

The “whole truth”, according to *Weigend*, is not needed for a domestic prosecution of a defendant. This “thorough analysis is necessarily reserved for the crime of the century variety, and even then, a criminal trial is not the appropriate device to get into the depths and details of the actions and motives of all individuals involved, actively or passively, in a crime”.<sup>22</sup>

If this is the case, should we then give up the truth-seeking purpose of a criminal trial all together? Should we leave it to truth-commissions and historians to find out what really happened? Should we just render justice without truth?

This cannot be the appropriate way of establishing justice because justice has to be based on truth.<sup>23</sup> This is the case in a domestic trial and in an international trial. The question is therefore: How much truth do we want to establish in a criminal proceeding? If we accept the fact that the “whole truth” is difficult to be found in a trial, because of procedural and factual obstacles, are we then satisfied with a “procedural truth” or do we aim for a “substantial truth”? Apart from the general discussion between the two fundamental concepts of criminal procedure, the question remains: What does society demand from a criminal proceeding? It might be enough for a domestic criminal trial, in which the crime is not based on a systematic and widespread violation of fundamental values, that a “procedural truth” is established. This kind of truth might justify punishment. Most domestic systems show a trend towards a more and more adversarial system. However, it has to be analysed in the next part whether a “procedural truth” is also sufficient in the context of international trials which are established in the context of mass violations.

### III. Truth-seeking in International Criminal Law

“The purpose of the trial is to render justice, and nothing else; even the noblest ulterior purposes – the making of a record of the Hitler regime [...] can detract from the law’s main business: to weigh the charges brought against the accused, to render judgment and to mete out due punishment”.<sup>24</sup>

In *Arendt’s* view it is not the task of an international court to establish the truth. The attempt to establish a historical record should rather be banned from the court room. But how is justice without truth and the comprehension of the past possible? Does not a judgement presuppose that some form of truth had to be found by the judges? *Arendt* is right in emphasizing that a judgement should be independent from external influences and the pressure from the society to overcome the past. However, her absolute statement concerning the truth-seeking function of a court does not seem coherent with the tasks international criminal courts have to face nowadays.

Although truth-seeking is defined as being simply a “by-product” of a criminal proceeding, its importance is larger in the context of international criminal law.<sup>25</sup> Justice *Robert Jackson* of the Nuremberg Trials acknowledged the importance of such trials for the truth-seeking objective after mass atrocities and emphasized that denial of such crimes would be difficult after they had been proven in detail by the court.<sup>26</sup> The significance of truth-seeking in these trials compared to domestic courts is based on the broader range of objectives of international criminal law that go beyond the mere establishment of guilt and innocence of individuals.<sup>27</sup> International criminal proceedings have a much broader spectrum of goals. Next to rendering justice for alleged wrongs it is also about national reconciliation, restoration, reparation, peace-building, prevention and deterrence of future violence, re-establishing the rule of law and also the creation of a historical record. The truth-seeking function of a proceeding goes hand in hand with the other objectives of a trial and constitutes to a certain extent their foundation.<sup>28</sup> If international criminal law goes beyond the traditional objectives such as retribution, prevention, rehabilitation and deterrence and serves mainly the purpose of reconciliation and peace-building, then truth-seeking also has to play a major role in the trial.<sup>29</sup> Reconciliation is based on truth. Without the acknowledgement of what has happened during a conflict and who was responsible, a lasting peace cannot be established in a past-conflict society. Forgiveness cannot be given unless somebody is identified as a perpetrator and as a victim. Without truth there will not be any justice for the victims, but also not for the perpetrators.<sup>30</sup> A historical record established by a court could help to educate society and prevent future atrocities.<sup>31</sup> Legal proceedings can help to give otherwise contestable facts the seal of truth through the establishment of these facts by legitimately established evidence.<sup>32</sup> Courts “produce a vast amount of testimonies, eyewitness accounts, depositions, legal filings and other

<sup>21</sup> *Weigend*, Harvard Journal of Law and Public Policy 2003, 157 (169 f.).

<sup>22</sup> *Weigend*, Harvard Journal of Law and Public Policy 2003, 157 (170).

<sup>23</sup> See also *Tieger/Milbert*, JICL 3 (2005), 666 (670).

<sup>24</sup> *Arendt*, Eichmann in Jerusalem, A book on the banality of evil, 1994, p. 253.

<sup>25</sup> *Naqvi*, International Review of the Red Cross 88 (2006), 245 (246); see also *Tieger/Milbert*, JICL 3 (2005), 666 (670).

<sup>26</sup> Report to the President from Justice *Jackson*, Chief of Counsel for the United States in the Prosecution of Axis War Criminals of 7.6.1945, reprinted in American Journal of International Law Sup. 39 (1945), 178 (184).

<sup>27</sup> *Rauxloh*, Judicature 94 (2011), 178; *Naqvi*, International Review of the Red Cross, 88 (2006), 245 (246); see also *Damaska*, Chicago-Kent Law Review 83 (2008), 329.

<sup>28</sup> *Naqvi*, International Review of the Red Cross 88 (2006), 245 (247).

<sup>29</sup> *Scharf*, Journal of International Criminal Justice 2 (2004), 1070 (1072).

<sup>30</sup> *Hankel*, ApuZ 42/2006, 3 (7).

<sup>31</sup> *Scharf*, Journal of International Criminal Justice 2 (2004), 1070 (1073).

<sup>32</sup> *Ignatieff*, Index on Censorship 5 (1996), 110 (117); see also *Scharf*, Journal of International Criminal Justice 2 (2004), 1070 (1080).

documents”.<sup>33</sup> These establish a broad picture of the truth, although they can probably not seek the “whole truth”. *Ignatieff* concludes that after a judgement it is “difficult for societies to take refuge in denial; the [war crimes] trials do assist the process of uncovering the truth”.<sup>34</sup>

People in a post-conflict society have therefore differing demands on a criminal trial compared to victims and society in an ordinary domestic system. Their claims are strongly focused on the truth-seeking function. A criminal judgement that establishes facts based on evidence according to the rules of a “fair trial” has a high value in the conventional understanding of a society. If a society did not lose its faith in the rule of law during the conflict, a judgement rendered from a hierarchically organized institution which is legitimized by the citizen, has the value of an official truth.<sup>35</sup> Also judgements of international tribunals, if their work is sufficiently promoted in the society and victims get the chance to participate in it, have significance. Especially due to the fact that most international courts prosecute systematic crimes and therefore discuss in depth in their judgements the institutional circumstances of a crime and a conflict, they can have an important impact on the re-establishment of the rule of law.<sup>36</sup> If the people have the feeling that a judgement is just and the institution delivering it is legitimate, the truth which is established is of extraordinary value, because it is “legally” established.

#### IV. Complementarity to truth-seeking commissions

Truth-commissions and trials, two key transitional justice mechanisms, have some common objectives; securing accountability, truth and some form of justice; deterring future atrocities and combat impunity.<sup>37</sup> Truth commissions became a frequently used transitional justice instrument in the last decades to fill the impunity gap which consequently occurs due to the fact that criminal courts after massive violations do not have the capacity to prosecute every perpetrator. Courts in international criminal law are usually focused on the prosecution of the most responsible perpetrators of a conflict. The truth found in the report of a truth-commission is usually understood to be better capable than a judgement to catch the social struc-

tures and conditions of a conflict and the systematic character of the crimes.<sup>38</sup> The main difference drawn between the two institutions is often characterized by the differing focuses; mainly perpetrator-focused in a trial and mainly victims-focused in a truth-commission.<sup>39</sup> Victims might not be the most useful witnesses in a trial and therefore only a certain number of them can be heard. However, their subjective experiences might be an important source for a peace-building-process in a society and the basis for recommendations of a truth-commission.<sup>40</sup> International courts, so *Simpson*, are not comprehensive truth-telling institutions in their own right. Working alone, they cannot achieve the broader goals of dealing with the past in post-conflict society, which requires extensive and systematic documentation, memory and honouring the victims, although their contribution to the wide truth-seeking endeavour is indispensable.<sup>41</sup> Truth-telling commissions and courts therefore have to complement one another in order to reach the highest level of truth.

The work of a tribunal, especially the prosecution’s office can benefit from the truth found in a truth-commission.<sup>42</sup> It can be an important source of contextual information and evidence. However, also criminal proceedings can support truth-seeking institutions by creating a better “overall environment” for such institutions and providing evidence for the hearings.<sup>43</sup> The truth-finding efforts of courts will support later truth-seeking institutions by providing documentation.

Yet, both institutions face the same obstacles. How do you get a perpetrator to talk, who does not want to tell what he knows, in order not to incriminate himself? This problem leads to the fact that the truth found in a truth-commission is mostly based on victims’ testimony. The truth of the perpetrator rests unknown. To overcome this fact several truth-commission have offered amnesties from criminal prosecutions to perpetrators who disclose their version of the truth.<sup>44</sup> This fact shows how important it is for post-conflict societies to seek truth – even at the expense of justice. This bargaining of truth for justice does not seem acceptable anymore in the international community. Several international treaties, by establishing a duty to prosecute international crimes, and especial-

<sup>33</sup> *Simpson/Hodžić/Bickford*, Looking back – looking forward, Promoting dialogue through truth-seeking in Bosnia and Herzegovina, 2012, p. 120.

<sup>34</sup> *Ignatieff*, Index on Censorship 5 (1996), 110 (117 f.).

<sup>35</sup> *Kemp* emphasizes that truth found in a domestic trial can also have the ability to re-establish the faith in the rule of law; Interview with *Susie Kemp*, former investigator of the ICC in Darfur, on 7.12.2012.

<sup>36</sup> Interview with *Marieka Wierda*, former associate legal officer at the ICTY, on 5.12.2012.

<sup>37</sup> *Valji* (fn. 9), p. 1, for a broad evaluation on the relationship between the TCL and SCSL in Sierra Leone, see *Schabas*, Human Rights Quarterly 25 (2003), 1035 (1064), where he states that the TLC and the SCSL “have much in common in terms of their overall objectives”. They both clarify the historical truth, both will address impunity, they provide a forum for victims and undermine future efforts to distort or deform the truth.

<sup>38</sup> *Valji* (fn. 9), p. 11; *Simpson/Hodžić/Bickford* (fn. 33), pp. 114 f.; However, *Wierda* argues that international courts can also give an important insight into the systematic character of a crime (fn. 36).

<sup>39</sup> *Valji* (fn. 9), p. 1.

<sup>40</sup> Interview with *Marieka Wierda*, former associate legal officer at the ICTY, on 5.12.2012.

<sup>41</sup> *Simpson/Hodžić/Bickford* (fn. 33), p. 115.

<sup>42</sup> *Simpson/Hodžić/Bickford* (fn. 33), p. 119.

<sup>43</sup> *Simpson/Hodžić/Bickford* (fn. 33), p. 119.

<sup>44</sup> For example the South African Truth and Reconciliation Commission of 1995, to be found on <http://www.justice.gov.za/trc/legal/index.htm> (30.6.2013) and Uganda’s Amnesty Commission based on the Amnesty Act from 2000.

ly the United Nations in their guidelines for peace-keeping representatives support this view.<sup>45</sup>

In contrast the use of plea bargaining in international criminal tribunals became a frequently used instrument, although it faces similar concerns amnesty laws do. In how far plea bargaining leads to a bargaining of truth for justice has to be examined in the next chapter.

### V. Plea bargaining in International trials

The use of plea bargaining in international criminal law has the same foundation than in domestic law systems. With an ever-growing crime rate and limited court resources, the capacity of the international courts is exhausted at one point or another.<sup>46</sup> A full criminal trial for every suspect seems therefore impossible. However, due to the broader objectives of international criminal law in the context of transitional justice and the gravity of the crimes that are being prosecuted by an international court, it has to be questioned if plea bargaining can be used in these trials.

It is important to primarily distinguish between two different forms of plea bargaining: “sentence bargaining” and “charge bargaining”. The former refers to the case in which the defendant receives a sentence reduction for pleading guilty based on an agreement between him and the prosecution. One of the major critiques on this practice is that the sentence lacks proportionality to the crime committed.<sup>47</sup> The latter includes cases in which the prosecutor drops some charges in exchange for a guilty plea of the defendant for one of the other charges. This agreement can undermine the truth-seeking function of a tribunal as will be later explained.

Due to their international nature the courts are somewhere in between an adversarial procedural system and an inquisitorial system and the use of plea bargains is therefore still contested. While plea bargaining is widespread in adversarial mostly common law systems, its use in more inquisitorial civil law systems is still debated and not generally accepted.<sup>48</sup> This is based on the different understanding of the purpose of a criminal trial as shown earlier and goes hand in hand with a divers comprehension of truth in a proceeding.

For example, in Germany the use of a “deal” in a criminal proceeding is still heavily debated, although codified in § 257c of the German code of criminal procedure (StPO) since 2009. On 19.3.2013 the German Federal Constitutional Court ruled

on the constitutionality of the practice of plea-agreements in front of German courts.<sup>49</sup> The decision was based on three appeals in which the defendants in criminal proceedings claimed to be put under pressure to agree in a plea bargaining. They claimed that their right to a fair trial, the principle of non-self-incrimination and the judge’s duty of disclosure were violated.<sup>50</sup> Although the Court ruled in favour of the constitutionality of the provision, it warned that the courts have to be careful when applying the provision concerning a “deal” not to violate the truth-seeking function of the court and the rights of the accused. The question remains also here: How much truth does a court need to render a judgement and how much truth does a society demand from a trial?

One could argue that with a trend in most domestic systems towards an adversarial system, in which negotiated criminal justice mechanisms are more common, also international criminal law should be open to such mechanisms.<sup>51</sup> In contrast “plea bargaining cannot be reconciled with the (traditional) inquisitorial version of truth-seeking”.<sup>52</sup> It is contrary to the main concept of this system that parties influence the outcome of the trial by their actions, and that it is not an independent judge who does so.<sup>53</sup>

While the procedural system of the ICC is more influenced by an inquisitorial system compared to the procedure in the ICTY, it remains unclear yet whether or not the use of plea bargaining is consistent with its mandate.<sup>54</sup> Art. 65 of the ICC Statute does not mention the possibility of a plea agreement explicitly. Besides the procedural and de facto concerns against this mechanism it will have to be seen whether plea bargaining seems at all acceptable in international criminal law due to the “gravity of the crimes being prosecuted”.<sup>55</sup> Also in domestic criminal systems plea bargaining is often not ap-

<sup>45</sup> Geneva Convention I 1949, Art. 49; Convention on the Prevention and Punishment of the Crime of Genocide 1951, Art. 1; Convention against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment 1987, Art. 4 and 6; Office of the United Nations High Commissioner for Human Rights, Rule-of-Law Tools for Post-Conflict States, Amnesties, 2009, to be found on [http://www.ohchr.org/Documents/Publications/Amnesties\\_en.pdf](http://www.ohchr.org/Documents/Publications/Amnesties_en.pdf) (30.6.2013).

<sup>46</sup> *Rauxloh*, *Judicature* 94 (2011), 178; *Stamp* (fn. 15), p. 148.

<sup>47</sup> *Rauxloh*, *Judicature* 94 (2011), 178 (179).

<sup>48</sup> *Clark*, *European Journal of International Law* 20 (2009), 415 (420); *Scharf*, *Journal of International Criminal Justice* 2 (2004), 1070 f.

<sup>49</sup> BVerfG, Judgement of 19.3.2013 – 2 BvR 2628/10, to be found on

[http://www.bundesverfassungsgericht.de/entscheidungen/rs20130319\\_2bvr262810.html](http://www.bundesverfassungsgericht.de/entscheidungen/rs20130319_2bvr262810.html) (30.6.2013).

<sup>50</sup> *Müller*, *Frankfurter Allgemeine Zeitung* of 5.10.2012, p. 12; *Bommarius*, *Frankfurter Rundschau* of 6.11.2012, to be found on

<http://www.fr-online.de/meinung/leitartikel-die-wahrheit-als-verhandlungssache.1472602.20805526.html> (30.6.2013);

German Federal Constitutional Court, Press release of 4.10.2012, to be found on

<http://www.bundesverfassungsgericht.de/pressemitteilungen/bvg12-071> (30.6.2013).

<sup>51</sup> *Scharf*, *Journal of International Criminal Justice* 2 (2004), 1070 (1071).

<sup>52</sup> *Weigend*, *Harvard Journal of Law and Public Policy* 2003, 157 (171).

<sup>53</sup> *Weigend*, *Harvard Journal of Law and Public Policy* 2003, 157 (171).

<sup>54</sup> *Henham/Drumbl*, *Criminal Law Forum* 16 (2005), 49 (84).

<sup>55</sup> *Clark*, *European Journal of International Law* 20 (2009), 415 (420); see also *Rauxloh*, *Judicature* 94 (2011), 178.

plied to the most severe crimes, because such an agreement seems morally unacceptable.<sup>56</sup>

#### VI. Earlier examples – plea bargaining used in the ICTY and ICTR

In proceedings in front of the ICTY plea agreements have frequently been used under the assumption that “a guilty plea is always important for the purpose of establishing the truth in relation to a crime”.<sup>57</sup> To this date, 20 agreements have led to judgements in front of the ICTY.<sup>58</sup> However, in the early years of the ICTY its first President, *Cassese*, expressively disapproves the use of plea bargaining in the Court and he reminded that “we always have to keep in mind that this tribunal is not a municipal criminal court but one that is charged with trying persons accused of the gravest possible of all crimes. [...] After due reflection, we have decided that no one should be immune from prosecution for crimes such as these, no matter how useful their testimony may otherwise be”.<sup>59</sup>

In 2001 the new Rule 62ter of the ICTY’s Rules of Procedure and Evidence was introduced which established the legal basis for plea agreements in the Court. In the second case in which the defendant agreed on a plea bargain the Court suddenly did not have any “doubt that plea agreements are permissible under the Statute and Rules of the Tribunal”.<sup>60</sup> This change in the attitude of the Court towards plea bargaining is due to different facts. Firstly, Judge *Cassese*, a judge coming from a mostly inquisitorial civil law system was re-placed by Judge *McDonald*, who comes from the United States adversarial common law system and was generally more in favour of the use of plea bargaining.<sup>61</sup> Al-ready in the case of *Erdemović*, in which the first attempt of a plea agreement occurred it was striking that the judges of common law systems saw a necessity for the introduction of the mechanism of plea bargaining in the Court.<sup>62</sup> Secondly, the need for the use of

guilty pleas seemed especially urgent after the adoption of the Tribunals completion strategy by the United Nations and the growing number of cases that came before the Court.<sup>63</sup> The Tribunal was suddenly exposed to an immense pressure by the UN to finish its work.<sup>64</sup>

Comparing the later plea bargains of the ICTY to its earlier ones it is important to reflect that the sentences offered by the prosecution became increasingly lenient. This was partly a result of the permanent pressure of the UN on the Court.<sup>65</sup> This trend towards almost inappropriate sentences recommended by the prosecution came to an end in 2003, when the Trial Chamber in the *Momir Nikolić* case ignored the recommendation of the Prosecutor to sentence the defendant to 15 to 20 years imprisonment. Instead *Momir Nikolić* received 27 years in jail.<sup>66</sup>

Although formally accepting plea bargains in the later years, the court still remained to a certain extent sceptical whether or not its use seems coherent with the mandate of the Court.<sup>67</sup> It was argued that mere reasons of efficiency are not sufficient grounds for a plea agreement and that always other reasons such as the protection of victims or the contribution of such an agreement to the truth-seeking function should be present.<sup>68</sup> The latter was frequently emphasized by the Court in its judgements although it will have to be seen to which extent plea bargaining can render a historical record.<sup>69</sup> Especially Judge *Schomburg*, from the German inquisitorial civil law system, argued strongly against plea bargains and criticized the inappropriate sentences recommended to the Court.<sup>70</sup> According to him there is “no peace without justice; there is no justice without truth, meaning the entire truth and nothing

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7.10.1997 – IT-96-22-A (Prosecutor v. Drazen Erdemović, Joint Separate Opinion of Judge McDonald and Judge Vohrah), para. 29.

<sup>63</sup> See UN Security Council Resolution 1503 of 28.8.2003 and 1534 of 24.3.2004; *Scharf*, Journal of International Criminal Justice 2 (2004), 1070 (1074); see also *Combs*, Vanderbilt Law Review 59 (2006), 67 (84 f.).

<sup>64</sup> *Clark*, European Journal of International Law 20 (2009), 415 (419); *Henham/Drumbl*, Criminal Law Forum 16 (2005), 49.

<sup>65</sup> *Combs*, Vanderbilt Law Review 59 (2006), 67 (92).

<sup>66</sup> *Combs*, Vanderbilt Law Review 59 (2006), 67 (87 and 96); see ICTY, Judgement of 2.12.2003 – IT-02-60/1-S (Prosecutor v. Momir Nikolić), para. 19, 181 and 183.

<sup>67</sup> See ICTY, Judgement of 2.12.2003 – IT-02-60/1-S (Prosecutor v. Momir Nikolić), para. 57 ff.

<sup>68</sup> ICTY (Trial Chamber II), Judgement of 30.3.2004, – IT-02-61-S (Prosecutor v. Deronjić), para. 236; ICTY, Judgement of 2.12.2003 – IT-02-60/1-S (Prosecutor v. Momir Nikolić), para. 67.

<sup>69</sup> See ICTY, Judgement of 5.3.1998 – IT-96-22-Tbis (Prosecutor v. Drazen Erdemović), para. 21; ICTY, Judgement of 27.2.2003 – IT-00-39&40/1 (Prosecutor v. Biljana Plavšić), para. 73.

<sup>70</sup> ICTY (Trial Chamber II), Judgement of 30.3.2004 – IT-02-61-S (Prosecutor v. Deronjić, Dissenting Opinion of Judge Wolfgang Schomburg), para. 4 f.

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<sup>56</sup> *Henham/Drumbl*, Criminal Law Forum 16 (2005), 49 (63); *Damaska*, Journal of International Criminal Justice 2 (2004), 1018 (1032 f.); see also ICTY (Trial Chamber II), Judgement of 30.3.2004, – IT-02-61-S (Prosecutor v. Deronjić, Dissenting Opinion of Judge Wolfgang Schomburg), para. 14 lit. a.

<sup>57</sup> ICTY, Sentencing Judgment of 31.7.2001 – IT-95-9/1-S (Prosecutor v. Stevan Todorovic), para. 81.

<sup>58</sup> UN ICTY, Guilty Pleas, to be found on <http://www.icty.org/sid/26> (30.6.2013).

<sup>59</sup> Statement by the President (of 11.2.1994 – IT-29) made at a briefing to members of diplomatic missions, cited in *Morris/Scharf*, An Insider’s Guide to the International Criminal Tribunal for Former Yugoslavia, Vol. 2, 1995, p. 649 (p. 652); see also *Combs*, Vanderbilt Law Review 59 (2006), 67 (84).

<sup>60</sup> ICTY, Judgement of 2.12.2003 – IT-02-60/1-S (Prosecutor v. Momir Nikolić), para. 57.

<sup>61</sup> *Scharf*, Journal of International Criminal Justice 2 (2004), 1070 (1073 f.); *Combs*, Vanderbilt Law Review 59 (2006), 67 (110 fn. 202).

<sup>62</sup> Judge *McDonald* from the United States and Judge *Vohrah* from Malaysia both demanded in their separate opinion for the use of guilty pleas in the Court, see ICTY, Judgement of

but the truth".<sup>71</sup> However he also recognizes the chance that plea bargaining can offer in some cases to establish at least some truth.<sup>72</sup>

Since 2004 the number of plea agreements has dropped due to the departure of Chief Prosecutor *Johnson* from the United States and the increasing public critique concerning these agreements in international trials.<sup>73</sup> After the departure of the Trial Chamber from the recommendations by the Prosecutor the defendants also have no certainty anymore if they will actually benefit from a guilty plea.<sup>74</sup>

At the same time the ICTR had different experiences with the use of plea bargaining under Rule 62 of its Rules of Procedure and Evidence. In general, fewer defendants in front of the ICTR were willing to agree upon a guilty plea. The reason can be partly found in factors such as the cultural background, the understanding of punishment and guilt and the acknowledgement of the guilt in Rwanda.<sup>75</sup> Also factors such as the agreement upon the location of the imprisonment and the location of the trial were likely to play an important role whether or not defendants would plead guilty.<sup>76</sup> The sentence reduction was only of minor role. Further reasons such as private monetary interests of defence counsels in longer trials and "health and life expectancy considerations" of the accused may also have led to a small number of guilty pleas.<sup>77</sup> It seems therefore inherent that differing factors in international criminal law, such as the context and circumstances of a conflict, are determining for the success of a plea bargaining.<sup>78</sup> In addition, the early case of *Kambanda* set a deterring example to defendants not to plead guilty. *Kambanda*, the former prime minister of Rwanda, was sentenced by the Court to life imprisonment although he had previously pleaded guilty and cooperated strongly with the prosecutor.<sup>79</sup>

One main concern that the court was facing was that the widespread belief prevailed in Rwandan society, that the massacres did not constitute genocide, but were part of the ongoing war between the Rwandan government and the RPF.<sup>80</sup> The defendants themselves therefore did not acknowledge

their guilt and would not plead guilty to charges of genocide. A guilty plea for genocide would alter fundamentally the historical record of the conflict that had been established in Rwandan society and would annihilate the legitimacy of many high-ranking officials in the government.<sup>81</sup> Only lower level defendants that pleaded guilty also did so concerning the indictment of genocide because they had no need to uphold the historical record.<sup>82</sup> A guilty plea for genocide in front of an international court would be of essential value for the truth-seeking process in the country and would counter denial. However, especially indictments concerning sexual violence during the Rwandan genocide, have been dropped in return for a guilty plea of a defendant.<sup>83</sup> This led to the result that sexual violence was completely eliminated from the final record of some cases and therefore no historical truth concerning rape victims was established.<sup>84</sup> The experiences in front of the ICTR show that many defendants in international trials are not willing to plea guilty because they feel justified for their "political crimes".<sup>85</sup> The plea agreements in the ICTR therefore did not contribute to an accurate historical record of the Court.

## VII. Pros and cons of plea bargaining for the truth-seeking function

Plea bargaining can contribute to the truth-seeking in a trial by revealing facts that otherwise could not have been established by the court. It offers the defendant a reason why he should testify to a broader extent. This new information can help the prosecution to start investigations that they would otherwise not have been able to undertake due to the lack of evidence or knowledge.<sup>86</sup> This benefit can be seen in the plea bargaining of *Momir Nikolić*<sup>87</sup> and *Erdemović*<sup>88</sup> before the ICTY, which enabled the prosecution to gather new information on the planning of the killings in Srebrenica. To a certain extent one could therefore argue that plea bargain helps to establish a historical record. Especially in international criminal law, where investigations are extremely difficult, a reduced

<sup>71</sup> ICTY (Trial Chamber II), Judgement of 30.3.2004 – IT-02-61-S (Prosecutor v. *Deronjić*, Dissenting Opinion of Judge Wolfgang Schomburg), para. 6.

<sup>72</sup> ICTY (Trial Chamber II), Judgement of 30.3.2004 – IT-02-61-S (Prosecutor v. *Deronjić*, Dissenting Opinion of Judge Wolfgang Schomburg), para. 11.

<sup>73</sup> *Combs*, *Vanderbilt Law Review* 59 (2006), 67 (98 f.).

<sup>74</sup> *Combs*, *Vanderbilt Law Review* 59 (2006), 67 (99).

<sup>75</sup> *Combs*, *Vanderbilt Law Review* 59 (2006), 67 (117 f.).

<sup>76</sup> *Combs*, *Vanderbilt Law Review* 59 (2006), 67 (115 f.).

<sup>77</sup> *Combs*, *Vanderbilt Law Review* 59 (2006), 67 (115 f.).

<sup>78</sup> Interview with *Marieka Wierda*, former associate legal officer at the ICTY, on 5.12.2012.

<sup>79</sup> See ICTR press release on <http://www.un.org/news/Press/docs/1998/19980911.afr98.html> (30.6.2013);

ICTR, Judgement of 4.9.1998 – ICTR-97-23-1 (Prosecutor v. *Jean Kambanda*), para. 61 f.; *Combs*, *Vanderbilt Law Review* 59 (2006), 67 (104 f.).

<sup>80</sup> *Combs*, *Vanderbilt Law Review* 59 (2006), 67 (118).

<sup>81</sup> *Combs*, *Vanderbilt Law Review* 59 (2006), 67 (119).

<sup>82</sup> See for example ICTR, Judgement of 5.2.1999 – ICTR-98-39-S (Prosecutor v. *Serushago*), para. 25.

<sup>83</sup> ICTR, Judgement of 5.2.1999 – ICTR-98-39-S (Prosecutor v. *Serushago*), para. 4.

<sup>84</sup> Women's initiative for gender justice, Election of the Prosecutor for the International Criminal Court, to be found on [http://www.coalitionfortheicc.org/documents/Prosecutor\\_Election\\_2011\\_WIGJ.pdf](http://www.coalitionfortheicc.org/documents/Prosecutor_Election_2011_WIGJ.pdf) (30.6.2013).

<sup>85</sup> Interview with *Marieka Wierda*, former associate legal officer at the ICTY, on 5.12.2012.

<sup>86</sup> *Naqvi*, *International Review of the Red Cross* 88 (2006), 245 (271); *Henham/Drumbl*, *Criminal Law Forum* 16 (2005), 49 (57); *Tieger/Milbert*, *JICL* 3 (2005), 666 (670, 674); *Damaska*, *Journal of International Criminal Justice* 2 (2004), 1018 (1032).

<sup>87</sup> ICTY, Judgement of 2.12.2003 – IT-02-60/1-S (Prosecutor v. *Momir Nikolić*), paras. 75 ff.

<sup>88</sup> ICTY, Judgement of 7.10.1997 – IT-96-22-A (Prosecutor v. *Drazen Erdemović*), para. 99.

sentence after a plea bargain might be preferable to a complete acquittal of the defendant due to a lack of evidence.<sup>89</sup> Plea bargaining can therefore play an important role in “accessing the only available evidence by inducing co-defendants to testify against their former leader”.<sup>90</sup>

However, due to the very limited number of prosecutions in front of an international court, especially the ICC, it is unlikely that a lower ranked defendant will testify against a higher ranked defendant, because the purpose of the court is only to persecute the most responsible. There is usually no pyramid structure in an international process.<sup>91</sup>

Furthermore, one can argue that even in cases where a judgement cannot be rendered, the proceedings “represent a wealth of evidence that is on the records”.<sup>92</sup> It could therefore be preferred, for the purpose of truth-finding, to have an acquittal instead of having only a “half-truth”. This can only be the case if we give the truth found in a procedural process the same value that we give an official judgement that establishes the facts. Each investigation by the court and the prosecutor before and during the trial in which evidence is secured is based on a high level of legitimacy resulting from legal norms and legal safeguards established by the international community or the treaty states. This legitimizing basis of the evidence found during the trial already has a high value itself. What is not established without a judgement is the guilt of the individual defendant. However, the separate facts of the past are legally established by the court, when proven beyond a reasonable doubt. As a result, also without a final judgement the truth found by a tribunal has therefore a high value for a post-conflict society.

In addition, one has to acknowledge that plea bargaining can enable a court to have a larger number of convictions in the end, because each case would take less time and money.<sup>93</sup> To some extent it might seem more satisfying to see more people in jail for a shorter time, than only a few for a longer sentence.<sup>94</sup> This could serve a broader truth relating to the number of cases and therefore establish a wider factual background of the systematic crimes. Such a mechanism seems even more necessary in an international criminal court than in a domestic proceeding, because most of the core crimes “comprise the repetitive, cumulative conduct of many individuals and that (these so called) chapeau elements call for fact-fin-

ding that relates to aspects of the larger context in which the crime was perpetrated”.<sup>95</sup>

One should however not ignore that plea bargaining is nevertheless capable to eliminate or change a historical record.<sup>96</sup> “Charge bargaining”, in which more serious charges are dropped in return for the defendant’s guilty plea only reveals some truth and represses truth to a big extent.<sup>97</sup> “Charge bargaining” has frequently been used in the ad hoc tribunals to drop charges of genocide for a guilty plea concerning crimes against humanity.<sup>98</sup> This was the case in the plea bargaining of Plavšić at the ICTY, in which her charges for the crime of genocide were dropped in return for her guilty plea on one occasion of persecution as a crime against humanity.<sup>99</sup> Furthermore, in the case of Dragan Nikolić the Court held that “neither the public, nor the judges themselves come closer to know the truth beyond what is accepted in the plea agreement. This might create an unfortunate gap in the public and historical record of the concrete case”.<sup>100</sup> As a result some victims will be deprived of their right to truth and some cases will not have the same symbolic judgement as they should have, if the defendant is “only” charged with crimes against humanity instead of genocide.<sup>101</sup> This became clear in the case of Deronjić which established the truth only concerning one specific village on one day.<sup>102</sup> Other atrocities committed by Deronjić were never factually established by the Court.

If truth is an essential foundation of justice a charge bargaining can also prevent that justice for victims and society can be reached in a criminal trial because the “inherent condemnation by the international community that makes an essential part of justice” is missing for certain charges that have been dropped.<sup>103</sup> If the effected society does not acknowledge the sentences of an international court, because it has the feeling that justice has not been done, the truth estab-

<sup>89</sup> *Henham/Drumbl*, *Criminal Law Forum* 16 (2005), 49 (84); *Rauxloh*, *Judicature* 94 (2011), 178 (180).

<sup>90</sup> *Rauxloh*, *Judicature* 94 (2011), 178 (183).

<sup>91</sup> Interview with *Marieka Wierda*, former associate legal officer at the ICTY, on 5.12.2012.

<sup>92</sup> Press Conference by the ICTY Prosecutor *Carla Del Ponte* (The Hague, 12.3.2006), cited in *Naqvi*, *International Review of the Red Cross* 88 (2006), 245 (247).

<sup>93</sup> *Rauxloh*, *Judicature* 94 (2011), 178 (180); *Tieger/Milbert*, *JICL* 3 (2005), 666 (671).

<sup>94</sup> Interview with *Marieka Wierda*, former associate legal officer at the ICTY, on 5.12.2012.

<sup>95</sup> *Damaska*, *Journal of International Criminal Justice* 2 (2004), 1018 (1033).

<sup>96</sup> *Combs*, *University of Pennsylvania Law review*, 151 (2002), 1 (145).

<sup>97</sup> *Naqvi*, *International Review of the Red Cross* 88 (2006), 245 (271); *Clark*, *European Journal of International Law* 20 (2009), 415 (416 and 426); see also ICTY, Judgement of 2.12.2003 – IT-02-60/1-S (Prosecutor v. Momir Nikolić), para. 63.

<sup>98</sup> *Rauxloh*, *Judicature* 94 (2011), 178 (179).

<sup>99</sup> ICTY, Decision of 20.12.2002 – IT-00-39&40/1-S (Prosecutor v. Biljana Plavšić, Decision granting prosecution’s motion to dismiss counts 1, 2, 4, 5, 6, 7 and 8 of the amended consolidated indictment); *Scharf*, *Journal of International Criminal Justice* 2 (2004), 1070 (1071).

<sup>100</sup> ICTY, Judgement of 18.12.2003 – IT-94-2-S (Prosecutor v. Dragan Nikolić), para. 122; ICTY, Judgement of 2.12.2003 – IT-02-60/1-S (Prosecutor v. Momir Nikolić), para. 65.

<sup>101</sup> *Clark*, *European Journal of International Law* 20 (2009), 415 (428).

<sup>102</sup> ICTY (Trial Chamber II), Judgement of 30.3.2004 – IT-02-61-S (Prosecutor v. Deronjić), paras. 2 f.

<sup>103</sup> *Rauxloh*, *Judicature* 94 (2011), 178 (179); see also *Henham/Drumbl*, *Criminal Law Forum* 16 (2005), 49 (78 f.).

lished in a tribunal will also not be accepted by either side. It is important for an international court that its judgements are acknowledged by society, because unlike a domestic court, an international court usually still has to prove its legitimacy. If a court therefore cannot establish a truth which is recognized by society the court fails its objectives. Plea bargaining could endanger the legitimacy of a court because it actually avoids a full trial and thus could give the impression that the court does not want to reach its goal, to establish truth.<sup>104</sup> Society might have the impression that efficiency and lower costs of a trial are more important than its actual objectives and therefore loses faith in the judgements. Truth without acknowledgement by the majority of a society will never be an accepted truth. The fact that a plea agreement avoids a full public trial derives the society of the chance to get a larger understanding of truth, because “a public trial, with the presentation of testimonial and documentary evidence by both parties, creates a more complete and detailed historical record than a guilty plea, which may only establish the bare factual allegations in an indictment or may be supplemented by a statement of facts and acceptance of responsibility by the accused”.<sup>105</sup>

Certainly one could argue that a plea bargain shows that the prosecutor had reasons to open a case and that the defendant accepts the ruling of the court.<sup>106</sup> This argument must however face some critique because plea bargaining could also force an innocent to admit a crime due to the fear that he would otherwise get even a higher sentence. It is therefore not certain that each plea bargain does reflect the actual facts and therefore establishes the truth. Especially in domestic cases it is often argued that the defendant is put under pressure by the prosecutor and court to agree to a plea bargain to shorten the proceedings.<sup>107</sup> The defendant would therefore involuntarily be deprived from a fair trial. It is not clear if such cases are likely to appear in international courts, but with the growing number of cases in front of the tribunals and the pressure put on the trials to deliver results it is not unlikely that this pressure is passed on to the defendants. A full trial could furthermore establish a broader understanding of the circumstances of a defendant’s behaviour and could therefore also sufficiently establish his version of the truth.

We have to consider as well how powerful a confession of a defendant is with view of the truth-seeking function of the court. One could argue that the confession brings a form of reconciliation to society because of the acknowledgement of the own guilt by the defendant. If the defendant himself accepts the truth, society on both sides of a conflict has reason to believe that the truth has been established. However, cases

like Plavšić show, that the acknowledgement of the truth by the defendant is only a relative one. After pleading guilty in front of the ICTY and receiving a reduced sentence for only one charge, Plavšić recalled her guilty plea after she was released from prison.<sup>108</sup> The impact of the guilty plea on the truth-seeking of a court can therefore only be seen in some cases as a limited contribution, because the credibility of the defendant’s earnest remorse and acknowledgement is often questionable. A recognition of the facts based on a plea agreement between the defendant and the prosecution is “not widely viewed as an act of truth-telling but rather [...] an act of treachery and betrayal in return for generous benefits”.<sup>109</sup> In addition, the argument that a plea agreement and the written statements of a defendant can offer a unique perspective of the events from the view of the perpetrator and are of indispensable value for the historical record of a conflict cuts too short.<sup>110</sup> It leaves out the fact that the truth offered by a defendant is usually only an incomplete and biased truth.<sup>111</sup> One has to decide whether an incomplete truth of a defendant only concerning some events and some victims is worthier than the truth established by a larger number of witnesses and victims, without the testimony of the defendant.

A guilty plea of a defendant has also a different impact on the truth that can be established through victims’ testimonies. It is argued that especially in international proceedings which take a long time, victims’ and witnesses’ testimonies become less reliable and therefore the defendant should be encouraged to testify himself.<sup>112</sup> Additionally, one could argue that a guilty plea saves the victim from getting re-traumatized in the criminal proceeding because he would have to give testimony what has happened from his perspective.<sup>113</sup> However, the value of such a testimony as a healing factor and a platform for truth-telling of victims should not be underestimated.<sup>114</sup> It is especially important that a victim sees his own truth being acknowledged in the judgement. If victims do not get a chance to demonstrate their perspective an international criminal court runs the risk of being too perpetrator focused. This would be contrary to the ICC’s mandate, which expressly states that victims, as part of the addressees of the courts restorative fun-

<sup>104</sup> *Rauxloh*, *Judicature* 94 (2011), 178 (180 and 185); see also *Damaska*, *Journal of International Criminal Justice* 2 (2004), 1018 (1030 f.).

<sup>105</sup> ICTY, Judgement of 2.12.2003 – IT-02-60/1-S (Prosecutor v. Momir Nikolić), para. 61.

<sup>106</sup> ICTY, Judgement of 27.2.2003 – IT-00-39&40/1 (Prosecutor v. Biljana Plavšić), para. 76.

<sup>107</sup> *Stamp* (fn. 15), p. 150; *Rauxloh*, *Judicature* 94 (2011), 178 (181).

<sup>108</sup> *Rauxloh*, *Judicature* 94 (2011), 178 (180).

<sup>109</sup> *Scharf*, *Journal of International Criminal Justice* 2 (2004), 1070 (1080).

<sup>110</sup> See *Tieger/Milbert*, *JICL* 3 (2005), 666 (671).

<sup>111</sup> *Clark*, *European Journal of International Law* 20 (2009), 415 (425); *Damaska*, *Journal of International Criminal Justice* 2 (2004), 1018 (1032).

<sup>112</sup> See *Rauxloh*, *Judicature* 94 (2011), 178 (183); *Henham/Drumbl*, *Criminal Law Forum* 16 (2005), 49.

<sup>113</sup> ICTY, Judgement of 31.7.2001 – IT-95-9/1-S (Prosecutor v. Stevan Todorovic), para. 80.

<sup>114</sup> *Henham/Drumbl*, *Criminal Law Forum* 16 (2005), 49 (59); *Rauxloh*, *Judicature* 94 (2011), 178 (181); see also ICTY, Judgement of 2.12.2003 – IT-02-60/1-S (Prosecutor v. Momir Nikolić), para. 62.

ction, should play an important role in the tribunal.<sup>115</sup> In contrast sentences based on a plea bargain are often seen as betrayals towards the affected society, because sentence reduction and the dropping of charges do not reflect the severity of the crimes and are likely to repress the truth.

In the *Deronjić* case, the ICTY argued that guilty pleas avoid denials of former atrocities in the society.<sup>116</sup> However, denials cannot be avoided completely by a guilty plea of a defendant. Quite the contrary, guilty agreements can also foster denials because they are seen by society as a bargaining of truth. Furthermore, the dropping of charges by the prosecutor could be interpreted to imply that these crimes did not occur.<sup>117</sup> The victims blame that not the “whole truth” has been revealed – the perpetrators see themselves as victims of victor’s justice which forced them into a plea agreement. Truth can therefore only be reached if it is acknowledged by perpetrators, victims and society. A truth that is not acknowledged does not have an important value for the process of transitional justice.<sup>118</sup>

A few pages of documentation by the defendant attached to a plea agreement cannot bring the same amount of truth a full judgement with several hundred pages of evidence and testimonies can offer.<sup>119</sup> A broader understanding of the circumstances of a conflict, a significant number of witnesses’ testimonies, an exhaustive collection of evidence and documentation in a trial can offer a broader picture of the truth.

#### VIII. The end of truth-seeking? – a conclusion

Due to a growing number of cases in front of the international tribunals and the pressure put on them to render judgements, did plea bargaining become a necessary tool in international criminal law? If so, is this the end of truth-seeking in an international trial or is the truth found in it with the help of this tool enough to be called “truth”? What does an affected society demand from a trial concerning the establishment of the truth?

Having displayed the benefits and disadvantages of plea bargaining concerning truth-seeking in a trial, they clearly show that plea bargaining is unlikely to establish a complete

truth of a crime. But also criminal procedures themselves usually do not establish the “whole truth”. Nevertheless, the desire for truth after mass atrocities and violations of fundamental rights is so strong that it justified in the past even a “non-prosecution of certain alleged offenders in ‘amnesty-for-truth’ or ‘use immunity’ situations”.<sup>120</sup> In these cases justice had been bargained for truth. The problem that plea bargaining faces is however that it often gives the impression that truth is bargained for mere reasons of efficiency of the proceeding and that the objectives, such as reconciliation, peace-building and establishment of an historical record, only play a minor role. Efficiency alone should never be a sufficient reason for a plea agreement.

To answer the question whether or not plea bargaining should be admissible in a court we have to decide what kind of truth we demand from an international criminal procedure. If we want to establish a “substantial truth” in comparison to a “procedural truth” the use of plea bargaining could endanger this objective. Deals do not establish the truth.<sup>121</sup> Substantial truth is not negotiable. If we have the demand to establish “procedural truth”, “a system openly promoting or even condoning such practices (plea bargaining), in the long run, loses all credibility with the public. This is so because truth and justice are intimately intertwined. A system cannot claim to seek justice when at the same time abdicating its claim for truth”.<sup>122</sup> If we have a lower demand on the truth-seeking function of a court, plea bargaining might seem acceptable. The objective of establishing a historical record would therefore be left mainly to historians and truth-commissions.

This “procedural” truth however does not seem enough in an international criminal court, which has, as mentioned at the beginning, much broader objectives than domestic courts. The truth-seeking purpose of the court as a transitional justice mechanism plays an important role. If “truth is the cornerstone of the rule of law, and it will point toward individuals, not peoples, as perpetrators of war crimes (and it is only the truth that can cleanse the ethnic and religious hatreds and begin the healing process”,<sup>123</sup> then every institution has to establish the maximum amount of truth possible. A court, which reflects legitimacy and independence, has an especially convincing and lasting voice in a post-conflict society and has therefore the chance to spread the truth.

Although the ICTY held in the case of *Deronjić* that “this Tribunal is not the final arbiter of historical facts. That is for historians. For the judiciary focusing on core issues of a criminal case before this International Tribunal, it is important that justice be done and be seen to be done, within the ambit of

<sup>115</sup> ICC, Report of 10.11.2009 – ICC-ASP/8/45 (Report of the Court on the strategy in relation to victims), Introduction, para. 3 to be found on <http://reliefweb.int/sites/reliefweb.int/files/resources/58901C8BE39F9B4749257673001BFFBB-ICC-ASP-8-45-ENG.pdf> (30.6.2013).

<sup>116</sup> ICTY (Trial Chamber II), Judgement of 30.3.2004 – IT-02-61-S (Prosecutor v. *Deronjić*), para. 260; *Clark*, European Journal of International Law 20 (2009), 415 (425); *Scharf*, Journal of International Criminal Justice 2 (2004), 1070 (1079).

<sup>117</sup> *Clark*, European Journal of International Law 20 (2009), 415 (428); *Scharf*, Journal of International Criminal Justice 2 (2004), 1070 (1080); *Henham/Drumbl*, Criminal Law Forum 16 (2005), 49 (83).

<sup>118</sup> *Clark*, European Journal of International Law 20 (2009), 415 (426).

<sup>119</sup> *Scharf*, Journal of International Criminal Justice 2 (2004), 1070 (1080).

<sup>120</sup> *Naqvi*, International Review of the Red Cross 88 (2006), 245 (246).

<sup>121</sup> *Stamp* (fn. 15), p. 149.

<sup>122</sup> *Weigend*, Harvard Journal of Law and Public Policy 2003, 157 (172).

<sup>123</sup> *Albright*, UN Ambassador to the UN, 1993, cited in *Naqvi*, International Review of the Red Cross 88 (2006), 245 (258 fn. 64).

the Indictment presented by the prosecution”<sup>124</sup>, one should not forget that justice can only be achieved through the discovery of the truth. Justice will only be acknowledged by society, the victims and perpetrators, if the court makes the impression to undertake an “honest effort to find the truth”.<sup>125</sup>

It might be the case that the increasing number of cases before the ICC will also lead this Court to the use of plea bargaining. As shown on the example of civil law systems, which adopt more and more mechanisms from adversarial systems to overcome the case-load they have to face, an equilibrium between the truth-seeking function of the court, the de facto obstacles of the court and contravening rights of the defendants has to be found. Nevertheless, the special importance of truth-seeking in international tribunals should be taken into account. Transplanting plea bargaining mechanisms from domestic systems into the international context can be dangerous due to the differing objectives.<sup>126</sup> In order not to bargain truth for efficiency some major guidelines should be followed.

Firstly, “charge bargaining” should be inadmissible before the court all together. Although “sentence bargaining” will also rise concerns facing the proportionality of a sentence, the real problem for truth-seeking lies within the “charge bargaining”.<sup>127</sup> If the prosecutor drops charges, many crimes will never be enlightened and several victims will never experience reconciliation. This idea is for example reflected in the German provision of § 257c para. 2 s. 2 StPO which expressly prohibits “charge bargaining”. Also the Columbian Justice and Peace Law from 2005 only includes a form of “sentence bargaining” which offers reduced prison sentences to paramilitaries for their disclosure of the truth.<sup>128</sup> Despite the fact that it is claimed that “sentence bargaining” often does not offer the defendant a valuable enough impulsion to plead guilty<sup>129</sup>, that should not be reason enough to allow “charge bargaining” to undermine the process of truth-finding in a trial.

Secondly, victims should play an important role in cases in which the defendant has already pleaded guilty. Otherwise they would be deprived from a necessary opportunity to face the past and to be heard. They should have the chance to testify in the sentencing hearing and play a role in “determining whether or not a plea should be accepted and on which term”.<sup>130</sup> The sentencing hearing would therefore become a public forum. Art. 65 para. 4 lit. a of the Rome Statute together with Rule 139 para. 1 Rules on Procedure and Evi-

dence could serve as an important source for the collection of evidence and the involvement of victims in the proceedings also after the defendant has pleaded guilty. However, it would have to be seen in how far the needs for efficiency in the trial, still one of the unofficial main reasons for plea bargaining, and the needs of the victims can be balanced.<sup>131</sup>

Thirdly, the ICC should focus on its role as a complementing institution and should limit its indictments, because it is not its function to prosecute every perpetrator.<sup>132</sup> By strengthening the domestic prosecution of crimes in the affected states or in other states based on the universality principle, the Court would avoid an immense case-load before it. A domestic prosecution of crimes would even contribute to a broader extent to the truth-seeking objective of transitional justice, because the post-conflict society itself would rehabilitate its past.

Fourthly, a detailed document should be added to the plea agreement which names all the indictments and the facts having been established by the court. We could compare the situation of plea bargaining to the earlier mentioned amnesty laws, in which the defendant often had to provide a full disclosure of the facts in order to profit from an amnesty.<sup>133</sup> The concern that could arise in front of a court is that the judges are not bound on the agreement between the defence and the prosecution. In the case in which the defendant discloses the full truth, he would therefore run risk of not getting the benefit of the plea agreement. However, in these cases it would have to be guaranteed that it is inadmissible for the court to use the guilty plea in its judgement.<sup>134</sup> The duty to disclose the “whole truth” in order to profit from a plea agreement could offer an important measurement for the truth-seeking objective.

Fifthly, the guilty plea of the defendant should be supported by evidence of the prosecution and any additional material collected during the (pre-)trial. The fact that the ICC Statute speaks in its Art. 65 about “admission of guilt” rather than “guilty plea” could implement that the proceeding applied in such a case is more oriented on an in-court confession used in civil law systems, instead of the Anglo-American guilty plea.<sup>135</sup> This practice could establish a broader record of facts for later trials but also for a historical record of the country.

<sup>124</sup> ICTY (Trial Chamber II), Judgement of 30.3.2004 – IT-02-61-S (Prosecutor v. Deronjić), para. 135.

<sup>125</sup> Weigend, Harvard Journal of Law and Public Policy 2003, 157 (172 f.).

<sup>126</sup> Henham/Drumbl, Criminal Law Forum 16 (2005), 49 (66).

<sup>127</sup> Combs, University of Pennsylvania Law review 151 (2002), 1 (146).

<sup>128</sup> Situation in Columbia, to be found on: <http://ictj.org/our-work/regions-and-countries/columbia> (30.6.2013).

<sup>129</sup> Combs, Vanderbilt Law Review 59 (2006), 67 (72 f.).

<sup>130</sup> Henham/Drumbl, Criminal Law Forum 16 (2005), 49 (59 and 82).

<sup>131</sup> Damaska, Journal of International Criminal Justice 2 (2004), 1018 (1032).

<sup>132</sup> Scharf, Journal of International Criminal Justice 2 (2004), 1070 (1080); Rauxloh, Judicature 94 (2011), 178 (185).

<sup>133</sup> Scharf, Journal of International Criminal Justice 2 (2004), 1070 (1081); see South African Truth and Reconciliation Commission: Art. 20 para. 1 lit. c Promotion of National Unity and Reconciliation Act 1995, to be found on <http://www.justice.gov.za/legislation/acts/1995-034.pdf> (30.6.2013).

<sup>134</sup> See Art. 65 para. 4 lit. b Rome Statute, which provides such a case.

<sup>135</sup> Damaska, Journal of International Criminal Justice 2 (2004), 1018 (1038); Rauxloh, Judicature 94 (2011), 178 (184).

Finally, the pressure imposed on the courts, mainly because of monetary reasons, should be decreased. The member states of the UN and the Rome Statute were aware that they would pay a high price for the establishment of the courts. But they were also willing to do so, because they decided that peace and justice would be sufficient reasons. And this is the case. *Scharf* argues that “the price of international justice is a fraction of the costs of operating a single UN peacekeeping mission”.<sup>136</sup> As a result, if the international community manages to establish peace with the help of tribunals, this will be the better and economic solution in the long run. It is likely that the ICC will not face similar pressure of the international community due to its complementarity purpose and its unlimited mandate. Less pressure on the court to render judgements would avoid it getting into the conflict whether or not to use plea bargaining.

The use of plea bargaining bears the risk of a truth bargaining. However, in cases in which the “whole truth” cannot be established this instrument, if used in the right manner, could at least help to establish a partly truth. The correct use of plea bargaining might also depend to a bigger extent on the cultural background of the defendants and the acceptance of such an instrument by the affected society.<sup>137</sup> It seems likely that also the ICC will use plea bargaining in the near future. That makes it necessary for the Court to establish guidelines for its use. The ICC Statute and the Rules of Procedure and Evidence do not imply which impact an admission of guilt has on the sentence or the procedure in front of the Court.<sup>138</sup> Therefore it is the task of the Court to define it. The main question concerning plea bargains remains and must be addressed by the court: How much truth can and must a criminal court establish? In international criminal law “substantive truth” should be the scale. The legitimacy of an international criminal court should therefore not only be based on the procedure but also on the truth of the judgement; “Otherwise we would have to blame ourselves that we built the temple, paid the priests, but lost our faith in truth.”<sup>139</sup>

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<sup>136</sup> *Scharf*, *Journal of International Criminal Justice* 2 (2004), 1070 (1078).

<sup>137</sup> For more information on the different experiences in the ICTY and ICTR see *Combs*, *Vanderbilt Law Review* 59 (2006), Part V pp. 24 ff.

<sup>138</sup> *Henham/Drumbl*, *Criminal Law Forum* 16 (2005), 49 (74); see Art. 65 ICC Statute.

<sup>139</sup> *Arzt* (fn. 15), p. 691 (p. 704).